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# Supreme Court of the United States

**October Term, 1994**

DONALD SELSKY,

*Petitioner,*

*against*

JERRY YOUNG, a/k/a RAMADAN,

*Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## Question Presented

Whether petitioner Selsky had absolute immunity from suit for the performance of his function as central office appellate reviewer of prison disciplinary determinations for all prisons in New York.

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IN THE

**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1994

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DONALD SELSKY,

*Petitioner,*

*-against-*

JERRY YOUNG, a/k/a RAMADAN,

*Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

---

## PETITION FOR A WRIT OF CERTIORARI

### Opinion Below

The opinion of the Court of Appeals is set forth in Appendix A. The opinion is reported at 41 F3d 47.

The judgment, decision of the District Court and report-recommendation of the magistrate judge are set forth in Appendix B. They are not reported.

## Jurisdiction

The decision of the Court of Appeals was filed on November 21, 1994. This petition for certiorari is filed within 90 days of that date. The Court's jurisdiction to review rests upon 28 USC § 1257(a).

## Statutory Provision Involved

42 USC § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

## Statement of the Case

Respondent was a prisoner in the Eastern Correctional Facility operated by the New York State Department of Correctional Services. He initiated the underlying action against petitioner and other defendants[1] pursuant to 42 USC

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[1]Other defendants, including the hearing officers, were named in an amended complaint. The action was dismissed against the other defendants and respondent did not appeal in that regard.

§ 1983 in the United States District Court for the Northern District of New York.[2] Respondent is "a paradigmatic litigious prisoner, having brought over 100, mostly frivolous *pro se* proceedings, at least 60 of which required action by (the Second Circuit)" (dissent below, 41 F3d at 57). Because of the egregiously harassing nature of his litigation, respondent has been effectively prohibited from bringing any new suits *pro se* or drafting complaints or petitions for other inmates. *See, In re Young,* unreported (SDNY, June 24, 1993) (Griesa, C.J.) (between 1980 and the filing of the instant 26 complaints plaintiff submitted 60 actions to the Southern District); *Young v Juckett*, unreported (NDNY Aug. 29, 1992) (McAvoy, J.) (pejorative comments to court; threatened to murder defense counsel). *In re Young,* unreported (SDNY May 10, 1991) (Brient, J.); *Young v Selsky,* unreported (SDNY July 13, 1989) (Brient, J.).

Since the judgment below was based upon petitioner's motion to dismiss pursuant to Fed R Civ P 12(b)(6), the allegations of the complaint are deemed true. In his complaint, respondent alleges that, in March, April, and May, 1992, petitioner Selsky, acting as the "Commissioner's Designee" (Cmplnt ¶ I[13]), affirmed a number of disciplinary determinations made against respondent after hearings which were constitutionally insufficient. Respondent alleges that in each of the hearings the hearing officer denied his request to call 31 inmates and various employees as witnesses and also that he was denied adequate pre-hearing assistance.

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[2]The basis for federal jurisdiction in that court was 28 USC § 1343.

The hearings respondent challenges were held pursuant to 7 NYCRR Pts 250 *et seq.*, which establish the prison disciplinary process in New York. *See, People ex rel. Vega v Smith,* 66 NY2d 130, 138-139 (1985). New York provides several procedural protections in addition to those required by due process under *Wolff v McDonnell,* 418 US 539 (1974); *e.g.* the provision for electronic recording. 7 NYCRR 254.6(b). *See, Walker v Bates*, 23 F2d 652, 655-656 (2d Cir 1994), petition for cert pending sub nom *Bates v. Walker,* No. 94-158. One of those is administrative appeal. 7 NYCRR 254.8. Such appeals from "Tier III"[3] hearing determinations are decided by the Commissioner or his designee.

Petitioner Selsky is the Commissioner's designee generally for purposes of § 254.8 and performed that function in the instant case for the hearings challenged by respondent. He has been the reviewer of record for the entire system (presently comprising 68 prisons and over 66,800 prisoners[4]) at all times since 1983 except for short periods when on vacation. He has two other people on his staff who perform reviews. He personally performs about a third of the total number of reviews and signs off on all

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[3]Tier III hearings, governed by 7 NYCRR Pt 254, are required whenever the violation of rules if substantiated would warrant imposition of a penalty beyond the 30 days of more restrictive confinement that may be imposed in a Tier II proceeding (7 NYCRR Pt 253).

[4]New York State Department of Correctional Services, Daily Population Capacity Report (February 2, 1995).

decisions. Between 1988 and 1994, some 39,400 reviews were performed pursuant to section 254.8.[5]

Under § 254.8, the Commissioner's designee must issue a decision within 60 days of the filing of the appeal. He has the power to affirm, modify, reverse or reverse and order a new hearing. If a new hearing is ordered, the penalty after the new hearing may not exceed the penalty in the first hearing. Acting as an independent judicial officer, he relies on administrative and state and federal court precedent in arriving at his decisions. Mr. Selsky wants to avoid reversals in state court proceedings and seeks to correct errors by ordering new hearings or reversing outright as he did in more than 4100 appeals from 1988 through 1994.[6] *See, e.g., Matter of Dawes v Coughlin,* 83 NY2d 597 (1994).

Mr. Selsky is the Director of Special Housing/Inmate Discipline for the Department of Correctional Services and works in the central office of the Department in Albany, New York. He is not on the staff of any correctional facility. His current supervisor is the deputy commissioner for facility operations. That person also is the supervisor for all the prison

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[5]Department of Correctional Services, 1988 Summary of Inmate Disciplinary Activity [4267 reviews; 409 reversals]; 1989 Summary of Inmate Disciplinary Activity [4832 reviews; 423 reversals]; 1990 Summary of Inmate Disciplinary Activity [5932 reviews; 563 reversals]; 1991 Summary of Inmate Disciplinary Activity [5612 reviews; 512 reversals]; 1992 Summary of Inmate Disciplinary Activity [5588 reviews; 590 reversals]; 1993 Summary of Inmate Disciplinary Activity [6295 reviews; 809 reversals]; 1994 Summary of Inmate Disciplinary Activity [6899 reviews; 834 reversals].

[6]Footnote 5, *supra.*

superintendents in the state. *Figueroa v Selsky*, SDNY, 91 Civ 3261, transcript of deposition, pp 21-28. In addition to appellate reviews, Mr. Selsky performs a technical assistance function advising facility staff from around the state, including hearing officers, about issues relating to the disciplinary process and in that capacity interacts with them a number of times a week. *Hameed v Mann,* NDNY, 89 Civ 578, transcript of jury trial, p 381. He also runs training sessions. *Gilbert v Selsky,* SDNY, 91 Civ 8489, transcript of deposition, pp 10-11.

**Decisions Below**

In a report-recommendation dated June 18, 1993, Magistrate Judge DiBianco recommended that petitioner's motion to dismiss under Fed R Civ P 12(b)(6) on the ground of Selsky's absolute immunity be granted. By order dated July 27, 1993, the district court approved the report/recommendation and dismissed the complaint for the reasons set forth.

On appeal, the Second Circuit reversed with Judge Van Graafeiland dissenting. The majority held that *Butz v Economou,* 438 US 478 (1978), and *Cleavinger v Saxner*, 474 US 193 (1985), establish the framework for deciding the issue (41 F3d at 51). The court agreed that "plaintiff in this case has abused the district court's resources in the past by engaging in a pattern of vexatious litigation" and that "the possibility of harassment is a potentially serious problem in administering the prison disciplinary system" (41 F3d at 53). The court also agreed that petitioner's "function resembles that of a judge" (41 F3d at 53). However, the court held that the balance of the pertinent factors tipped against petitioner. The most important factors in that regard were "the lack of a sufficient guarantee of (petitioner's) independence and

insulation from communication with hearing officers about specific cases" (41 F3d at 54). In addition, it was important for the majority that New York's disciplinary hearings suffer from the same procedural shortcomings as those in *Cleavinger* except for the provision of a transcript (41 F3d at 53-54) and that the type of injury alleged by respondent may not be adequately correctable on appeal (41 F3d at 54).

The gravamen of Judge Van Graafeiland's dissent was that, since petitioner "is a professional civilian hearing officer who performs a role analogous to that of an appellate judge" (41 F3d at 56), the potential for harassing and vexatious litigation is the essential factor and warrants absolute immunity. He noted

> Congress could not have intended that *pro se* civil rights litigation become a 'recreational activity' for long-term residents of our prisons. * * * However, this is what has occurred (41 F3d at 55).

Citing all-too-numerous filings from specific inmates around the country (41 F3d at 55) as well as respondent (41 F3d at 57), he stated as reasons for awarding immunity the drain on the valuable official time of defending numerous suits and the duty to husband the limited resources of the United States courts (41 F3d at 55-56). As for petitioner's activities as a trainer and provider of technical assistance, upon which the majority had relied, he found that petitioner's consultation and training were limited to legal issues, which was not proscribed by *Butz*, and there is no evidence such occurred in this case in any event (41 F3d at 56-57). With respect to qualified immunity, he found it an unsatisfactory solution because of the drain on petitioner and limited court resources resulting from the need to plead and prove the defense (41 F3d at 57). Finally, he noted

that prisoners seeking only monetary relief will have little to gain by suing petitioner except the satisfaction of harassment since the primary responsibility for the hearing errors lies with the hearing officer (*ibid.*).

## REASONS FOR GRANTING THE WRIT

**Certiorari is warranted because the question of absolute immunity for a person in petitioner's position is an important question of federal law which should be settled by this court.**

This case raises the issue of immunity for quasi-judicial personnel under *Cleavinger v Saxner* and *Butz v Economou.* The majority and dissent agree, as the facts require, that petitioner's "function resembles that of a judge" (41 F3d at 53, 56). Their disagreement concerns the evaluation and weight to be given to the factors for determining absolute immunity stated in *Butz* and *Cleavinger.* For the dissent, the dispositive consideration was that "*pro se* civil rights litigation (has) become a 'recreational activity' for long term residents of our prisons", resulting in excessive filings by numerous prisoners all over the country including respondent who has been prohibited from filing any new *pro se* litigation because of his harassing and vexatious litigation manner. This vexatious litigation not only requires the expenditure of significant valuable official time in defense, but the processing of all of them on the merits constitutes a significant burden on the limited resources of the United States courts as well. Moreover, since the primary responsibility for hearing errors lies with hearing officers and § 1983 damage actions may readily be prosecuted against them for hearing errors, prisoners have little reason to sue petitioner except harassment.

The majority placed primary emphasis instead on the fact that Selsky serves at the pleasure of superiors within the Department and provides technical assistance to hearing officers. In our view, the majority erred in considering as critical petitioner's placement in the hierarchy and his provision of technical assistance. That is inconsistent with the teachings of *Cleavinger* and *Butz* and directly conflicts with *Shelly v Johnson,* 849 F2d 228 (6th Cir 1988). The dissent by contrast correctly emphasized the obvious risk of harassing and vexatious litigation and properly assessed the pertinent factors under that case law.

Certiorari should be granted so that the Court can resolve the question of how to apply the teachings of *Butz* and *Cleavinger* and thereby resolve the conflict between the circuits in that respect. The issue is important because the traditional ground for according absolute immunity to judges—"the avalanche of suits, most of them frivolous, but vexatious" (*Forrester v White,* 484 US 219, 226 [1988]) and the resulting expenditure of time defending them and the drain on the federal court's limited resources—is especially implicated here. Petitioner has been sued hundreds of times (*Hameed v York,* SDNY 89-CV-578, jury trial transcript p 394) and has been deposed at least 20/25 times. *Ibid.* p 395. The Attorney General's records show that he is currently a defendant in some 150 pending § 1983 cases. Moreover, as the dissent noted (41 F3d at 57), the potential for even more litigation is great. As the Commissioner's designee under 7 NYCRR 254.8, petitioner is the administrative reviewer for the entire system and annually reviews many thousands of disciplinary hearings. Thus, given the 3-year statute of limitations (*Owens v Okure,* 488 US 235, 251 [1989]), and the fact that he has affirmed some 14,000

determinations since 1992[7], he is potentially a defendant in a staggering number of cases. The potential problem is of national significance. There are over 1 million prisoners nationwide. Most state prison systems have some form of appeal mechanism (Babcock, Due Process in Prison Disciplinary Systems, 22 BCL Rev 1009, 1083-1085 [1981]) and a large number of disciplinary hearings is a characteristic of prison systems throughout the United States. Jones & Rhine, Due Process and Prison Disciplinary Practices: From Wolff to Hewitt, 11 New England Journal on Criminal and Civil Confinement, 105-106 (1985). The number of prisoner § 1983 lawsuits overall is at a high level, 26,824 in 1992, about 10% of the total number of civil filings in the federal courts. U.S. Dept. of Justice, Bureau of Justice Statistics, Challenging the Conditions of Prisons and Jails: A Report on Section 1983 Litigation p 2 (Dec., 1994). That study concluded that about 13% of that total of prisoner cases raised a procedural due process issue. *Id.*, p 17.

Moreover, the holding below is incorrect under applicable Supreme Court law. It is settled that judges have absolute immunity from § 1983 damage actions for judicial acts within their jurisdiction *(Pierson v Ray*, 386 US 547, 553-554 [1967]) and that absolute immunity is designed to free the judicial process from the harassment and intimidation associated with the litigation which would otherwise be an inevitable concomitant of the adjudicative function. *Forrester v White*, 484 US at 226-227. Absolute immunity has been extended to executive officials "who perform functions closely associated with the judicial process". *Cleavinger v Saxner*, 474 US at 200. The

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[7]Footnote 5, *supra*. In addition to the reversals, there were over 2,200 modifications.

focus is on the precise function performed by the official seeking absolute immunity. *Mireles v Waco*, ___ US ___, 112 S Ct 286, 288, 116 L Ed 2d 9, 15 (1991); *Butz v Economou*, 438 US at 508-517.

For the majority below, it was critical that petitioner serves at the pleasure of superiors within the Department of Correctional Services and provides technical assistance to hearing officers; in their view, those facts rendered him insufficiently independent to warrant absolute immunity. That is wrong. Officials are accorded absolute immunity "not because of their particular location within the Government but because of the special nature" of the function exercised in the proceeding at issue. *Butz*, 438 US at 511.

The fact that petitioner is subordinate to the Commissioner is not per se dispositive. Indeed, in *Butz*, the ALJ's decision was only a recommendation, and after a process in the nature of an "appeal" (5 USC § 557[b]; 7 CFR 1.170 [Jan. 1, 1994]), the final order was issued by the "Judicial Officer". Because he was thus an integral part of the adjudicatory process, the district court on remand from the Supreme Court's decision accorded him absolute immunity. *Economou v Butz*, 466 F Supp 1351, 1358 (SDNY 1979), *aff'd without opn*, 633 F2d 203 (2d Cir 1980). Applicable regulations define the "judicial officer" in the United States Department of Agriculture as "an official * * * delegated authority by the Secretary * * * to perform the function involved" (7 CFR 1.161[g]). He is "authorized to act as final deciding officer in adjudication proceedings subject to 5 USC 556 and 557". 7 CFR 2.35(a). It was irrelevant in *Butz* that the judicial officer was subordinate to the Secretary of Agriculture. The same result should obtain here.

The majority's holding directly conflicts with the reasoning of the Sixth Circuit's decision in *Shelly v Johnson* which the court below asserted, without discussion, was factually distinguishable. In our view, the factual differences do not justify the conclusion below that being in any subordinate position bars absolute immunity. In *Shelly,* the hearing officers in Michigan prison disciplinary proceedings were held sufficiently independent to warrant absolute immunity because they were "professional hearing officers in the nature of administrative law judges." 849 F2d at 230. Nevertheless, they were under the direction and supervision of a special hearing division in the Michigan Department of Corrections; the division was "under the direction and supervision of the hearings administrator who is appointed by the director of the department." Mich. Comp. Law 791.251. It was critical for the court in distinguishing *Cleavinger* that they were not "simply prison employees subordinate to the prison warden". 849 F2d at 230.

*Shelly,* unlike the majority below, understood the essential reason why immunity was denied in *Cleavinger*. There, the decisionmakers and charging personnel were the same rank and status in the same institution under the same warden, a situation "hardly * * * conductive to a truly adjudicatory performance". 474 US at 204. The members of the disciplinary committee were guards "temporarily diverted from their usual duties"; they were the direct subordinates of the warden who reviewed their decision and they "work with the fellow employee who lodg[ed] the charges against the inmate upon whom they sit in judgment * * *. They thus are under obvious pressure to resolve a disciplinary dispute in favor of the administration and their fellow employee". *Ibid.* That is sharply different from the situation in *Shelly* and here, where the official at issue is a professional judicial officer within the ambit of the central

office and substantially separate and apart from the local facility correctional officers bringing the charges.

The majority's emphasis on petitioner's provision of technical assistance is likewise misplaced. "[I]mmunity is justified and defined by the *functions* it protects and serves, not by the person to whom it attaches." *Forrester v White,* 484 US at 227 (emphasis in original). There is no claim that petitioner provided such assistance to the hearing officers in this case and, as *Forrester* exemplifies, his performance of nonjudicial functions as part of his job does not per se deprive him of absolute immunity when performing his judicial function. Further, the dissent correctly concluded that he provides assistance only with respect to legal issues, which is permitted by *Butz.*

The majority below also placed undue emphasis upon the lack of procedural safeguards at the hearing. It is apparent from *Cleavinger v Saxner* that the limited nature of the protections afforded at the hearing and the fact that the process is not truly adversary are not critical. *Cleavinger* concerned disciplinary proceedings in the federal prisons. Federal prisoners are accorded hearing rights no more extensive than those for state prisoners. *Compare, Cleavinger,* 474 US at 206 with *Wolff v McDonnell.* Nevertheless, in *Cleavinger*, the Court suggested that if ALJs were substituted for the correctional officers and presided over prison disciplinary hearings, they would have immunity (474 US at 208). There was no mention of any change in the procedures.[8]

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[8]The suggestion came in response to the argument that denial of absolute immunity to prison disciplinary board members would result in substantial damages. The Court stated that administrative law judges (who have immunity [474 US at 200]) could be substituted as hearing officers if the "problem becomes acute". 474 US at 208.

Again, the Sixth Circuit in *Shelly v Johnson* correctly understood *Cleavinger*. Absolute immunity was accorded to the Michigan's hearing officers because they were ALJs within the meaning of *Cleavinger*, notwithstanding that the hearing required to be provided by Michigan law essentially conformed only to the limited requirements in *Wolff*. Mich. Comp. Law §§ 791.252-791.253.

The majority below also too narrowly cabined the relief available to inmates in respondent's position if petitioner is accorded absolute immunity. Although implicitly acknowledging the efficacy of New York's provision for judicial review pursuant to CPLR Article 78, as the numerous cases annotated in McKinney's Consolidated Laws of New York Annotated demonstrate (Book 7B, Civil Practice Law and Rules, CPLR 7701 to 8000, pp 573-593 [1994]),[9] the majority relied upon the uncertainty of a damages remedy in the state courts to hold that the type of injury alleged by respondent may not be adequately correctable on appeal. However, nothing in *Butz* or *Cleavinger* remotely suggests that available federal damage remedies should be ignored. In this regard, the most important consideration in the instant case is that section 1983 damages actions for all compensable injury may readily be prosecuted against hearing officers even if the Commissioner's designee on

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[9]Article 78 is a sufficiently effective remedy so as to have been the basis for many decisions in the Second Circuit holding that New York provided all the process due in various other contexts. *See, e.g., Interboro Institute, Inc. v Foley*, 985 F2d 90, 93 (2d Cir 1993); *Katz v Klehammer*, 902 F2d 204, 207 & n 1 (2d Cir 1990); *Campo v New York City Employees Retirement System*, 843 F2d 96 (2d Cir), *cert. denied*, 488 US 889 (1988); *Eastway Construction Corp. v City of New York*, 762 F2d 243, 250 (2d Cir 1985), *cert. denied*, 484 US 918 (1987); *Giglio v Dunn*, 732 F2d 1133 (2d Cir 1984), *cert. denied*, 469 US 932 (1984).

appeal is accorded absolute immunity. *See, Butz v Economou,* 438 US at 525 (Rhenquist, J., concurring in part and dissenting in part).[10] Should a prison disciplinary hearing be conducted in violation of an inmate's constitutional rights, the hearing officer is the primary actor and the action accrues when the hearing error occurs. *Walker v Bates, supra,* 23 F3d at 658-659. Under New York's scheme, petitioner acts *only* as an appellate reviewer and cannot enhance the penalty given at the hearing. Thus, his action on review cannot add to an inmate's compensable injury. Inmates can only recover damages in § 1983 actions for compensable injuries. *Carey v Phiphus,* 435 US 247, 254-255 (1978).

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[10]Although New York currently has four ALJ hearing officers for whom we have claimed absolute immunity (the issue is pending in the Second Circuit, *Tulloch v Coughlin* [Docket No. 93-2624]), the vast bulk of the hearings (in 1994, there were 25,661 Tier III hearings, [DOCS, 1994 Summary of Inmate Disciplinary Activity) are conducted by local prison officials who, as the majority below stated, have only qualified immunity (41 F3d at 54).

## CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Dated: Albany, New York
February 13, 1995

Respectfully submitted,

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**APPENDIX A—Opinion of the United States Court of Appeals for the Second Circuit Dated November 21, 1994.**

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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No. 1117 August Term 1993

Originally Submitted pro se: April 26, 1994 Decided: November 21, 1994

Final submission after appointment of counsel for appellant: September 14, 1994

Docket No. 93-2567

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JERRY YOUNG a/k/a RAMADAN,

*Plaintiff-Appellant,*

*against*

DONALD SELSKY, P. ORENGO, R. ALTHOUSE, R.J. CUNNINGHAM, D. SCHALLER, L. JEWETT,

*Defendants-Appellees.*

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Before: FEINBERG, VAN GRAAFEILAND and WINTER, Circuit Judges.

Appeal from judgment entered in United States District Court for the Northern District of New York, Neal P. McCurn, J., holding defendant Selsky, the appellate reviewer of state prison disciplinary hearings, absolutely immune from suit and dismissing complaint against him.

Reversed and remanded. Judge VanGraafeiland dissents in separate opinion.

STEPHEN M. LATIMER, New York, NY (Prisoners' Legal Services of New York, Inc., David C. Leven, of Counsel, Laila Ghabrial, Law Student on the brief, for Plaintiff-Appellant.

G.OLIVER KOPPELL, Albany, NY, Attorney General of the State of New York (Peter H. Schiff, Deputy Solicitor General, Peter G. Crary, Assistant Attorney General, Martin A. Hotvet, Assistant Attorney General, of Counsel), for Appellees.

FEINBERG, Circuit Judge:

Jerry Young, also known as Ramadan, appeals from an order entered in July 1993 in the United States District Court for the Northern District of New York, Neal P. McCurn, J. The order approved the Report-Recommendation (the Report) of Magistrate Judge Gustave J. DiBianco filed in June 1993 and dismissed plaintiff Young's complaint under 42 U.S.C. § 1983 against defendant-appellee Selsky. The court held that plaintiff could not press his claim against defendant because of defendant's absolute immunity from suit. For reasons set forth

below, we reverse the decision of the district court and remand for further proceedings.

## I. Background

In February through May 1992, plaintiff was a prisoner in the Eastern Correctional Facility in Napanoch, New York, which is operated by the New York State Department of Correctional Services (DOCS). He brought this action, pro se, to challenge disciplinary proceedings conducted in that facility. Defendant Selsky is the Director of the Office of Special Housing and Inmate Disciplinary Programs for DOCS. He has been designated by the Commissioner of DOCS as the sole designee to hear prisoners' appeals of decisions rendered by DOCS disciplinary hearings officers in cases involving the most serious disciplinary offenses, so-called Tier III superintendent's hearings. 7 N.Y. Comp. Codes R. & Regs. (7 NYCRR) § 254.8; Moye v. Selsky, 826 F. Supp. 712, 714 (S.D.N.Y. 1993). Selsky held this position at the time of Young's disciplinary proceedings and continues to serve in this capacity as of the writing of this opinion.

This litigation stems from disciplinary actions taken against plaintiff Young in the first half of 1992. In five separate hearings, prison hearing officers found plaintiff guilty of violating various Misbehavior Rules. Plaintiff was sentenced to punitive segregation in the prison's Special Housing Unit (SHU) and was deprived of inmate privileges. SHU prisoners are confined in "single-occupancy cells grouped so as to provide separation from the general population." Walker v. Bates, 23 F.3d 652, 655 (2d Cir. 1994), petition for cert. filed, 63 USLW 3092 (July 25, 1994). SHU prisoners may possess only limited personal belongings and prison issue items. Their

privileges to use the telephone or receive packages are limited as well.

Young appealed each decision to Selsky, who affirmed in each case. Over the course of the hearings, Young had asked to call 31 inmates and two staff officers as witnesses. He contends that the hearing officers in each case denied his requests, thus violating his due process rights.

Plaintiff filed his original complaint in July 1992, naming only Selsky as defendant. Plaintiff sued under 42 U.S.C. § 1983, claiming that defendant had violated his due process rights by affirming the results of each of his allegedly unfair hearings. Plaintiff's complaint sought "release from SHU and restoration of his privileges and rights, etc., and expungement of all misbehavior reports from his files, and declaratory relief by way of order to show cause for a T.R.O. and/or P.I.," as well as "$200 dollars in punitive damages and $200 dollars in compensatory damages and $200 exemplary damages for each day of confinement."

In September 1992, plaintiff filed a second complaint against the four hearing officers who had presided over his disciplinary hearings and against the prison-appointed employee assistant who had helped plaintiff at one of his hearings. Plaintiff alleged that this last defendant had failed to provide him with adequate assistance and that the hearing officer defendants were responsible for violations of plaintiff's rights during the hearings.

The district court referred plaintiff's complaints to Magistrate Judge DiBianco. Thereafter, defendant Selsky moved to dismiss the complaint against him, arguing, among other things, that he was absolutely immune from suit. An accompanying affidavit of Assistant Attorney General Sue H.R. Adler pointed out that administrative appeals from disciplinary determinations in over 60 prisons in New York are directed to defendant's office, and that he works in the central office of the Department

of Correctional Services, completely separate from any correctional facility. She asserted that his position is functionally comparable to that of an appellate judge. Plaintiff apparently filed an answering affidavit, pro se.

In his Report, the magistrate judge recommended that the first complaint be dismissed because Selsky was absolutely immune from suit and that the second complaint be dismissed because proper service had not been made on those defendants. The magistrate judge relied not only on the Adler affidavit but also on the magistrate's own Report-Recommendation in an earlier case involving Selsky, Dawes v. Selsky, No. 91-DV-0479 (N.D.N.Y.), and on the record there made. In that case, according to the magistrate judge, Selsky had furnished the court with an affidavit filed in still a third case, Codrington v. Selsky, No. 90-CV-868 (N.D.N.Y.), which stated that Selsky had administratively reviewed over 15, 000 Tier III disciplinary determinations between 1988 and 1990 and that hundreds of civil suits had been brought against him by dissatisfied inmates. Also, apparently relying on the expanded record, the magistrate judge found that "Selsky is insulated from political influence."

In June 1993, plaintiff Young filed objections to the magistrate's Report, contesting its finding that defendant Selsky was entitled to absolute immunity. In July 1993, Judge McCurn approved the Report and dismissed both complaints. Plaintiff appeals only from dismissal of his complaint against Selsky.

## II. Discussion

### A. Procedural Background

This case comes before us in an unusual procedural posture. When plaintiff appealed from the adverse decision of the district court, he represented himself. Because of the impor-

tance and complexity of the issue presented in this case, on which district courts in this circuit are divided,[1] we appointed counsel and requested rebriefing. In the subsequent brief filed by his counsel, plaintiff complains that the magistrate's Report relied on documents that were not before the court, at least one of which plaintiff had never seen. These included the magistrate judge's earlier Report-Recommendation in *Dawes v. Selsky* and Selsky's affidavit in *Codrington v. Selsky.*

Further complicating the record before us on appeal, plaintiff has supplied us with an additional appendix, which contains portions of defendant Selsky's depositions and trial testimony in still other actions that challenged his alleged immunity to suit. Plaintiff also seeks to have us consider portions of defendant's sworn testimony that were quoted by the district court in Moye v. Selsky, 826 F. Supp. 712, 722-23 n.11 (S.D.N.Y.

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[1]Compare Moye v. Selsky, 826 F. Supp. 712, 724 (S.D.N.Y. 1993) (holding Selsky not entitled to absolute immunity); Lopez v. Coughlin, 92 Civ. 7713 (KMW), 1994 WL 557988 (S.D.N.Y. Oct. 11, 1994); Silva v. Sanford, 91-CV-1776, 1994 WL 455170, at 20 (S.D.N.Y. Aug. 18, 1994) (same); Gilbert v. Selsky, 91-CV-848, 1993 WL 515927, at *2-3 (S.D.N.Y., Sept. 9, 1994) (same) with Sealey v. Coughlin, 857 F. Supp. 214, 218 (N.D.N.Y. 1994) (holding Selsky entitled to absolute immunity); Cortez v. Selsky, 91 Civ. 1905 (RWS) , 1994 WL 484383, at *2-6 (S.D.N.Y. Sept. 7, 1994) (same) ; Gaston v. Coughlin, 91 Civ. 5788, 1994 WL 460490, at *11-12 (W.D.N.Y. Aug. 12, 1994) (same) ; Hameed v. Mann, 89-CV-578 (N.D.N.Y. Nov. 9, 1993) (same); Parris v. Coughlin, 90 CV 414, 1993 WL 328199, at *4 (N.D.N.Y. Aug. 23, 1993) (same) ; Parkinson v. Employee Assistant, DCF, 91 Civ. 7401 (KMW), 1993 WL 118451 (S. D. N. Y. Apr. 7, 1993) (same) ; Pacheco v. Kihl, Civ.-90-549T, 1991 WL 629846, at *3-4 (W.D.N.Y. Dec. 17, 1992) (same); Gayle v. Selsky, Civ. 90-729L (W.D.N.Y. Feb. 19, 1992). A Nebraska district court has also held prison disciplinary appeal officers to be entitled to absolute immunity. Shaddy v. Gunter, 690 F. Supp. 860, 864-65 (D. Neb. 1988).

1993). Apparently, none of this was before the district court when it ruled on the motion to dismiss. However, the New York State Attorney General's office, which represents defendant in this case, presumably is familiar with these other proceedings because it represented defendant in all of them as well. These excerpts from defendant's prior testimony contain several important statements. Defendant said that he has telephone conversations approximately three times per week with hearing officers in which he gives advice on how to conduct the disciplinary hearings. Sometimes the hearing officers phone him to ask his advice during the course of a hearing. Also, defendant stated that "it is likely" that he would be called upon to review on appeal the very issues upon which he had offered advice. Moreover, he said that as part of his performance evaluations his supervisor conveys to him the objections of superintendents to his adverse rulings.

Although the use by plaintiff's counsel of prior testimony in other cases is somewhat unorthodox, the answering brief filed by the Attorney General for defendant raises no objection and does not contest the accuracy of the statements. To the contrary, defendant relies on some of this material to support his contention that he is subject to harassing litigation by inmates and is therefore entitled to absolute immunity. Since plaintiff asks us to take judicial notice of these transcripts and since defendant's brief in response does not object to this procedure, we believe that defendant has had an adequate opportunity to object to or otherwise comment on that proposed course of action. Cf. Fed. R. Evid. 201(b)&(e). While we could simply remand to the district court for a fuller development of the record, we believe that in view of the factual material already brought to our attention by both sides and relied upon by them, it is preferable to resolve the basic issue before us regarding absolute immunity. Under the unusual circumstances of this case,

therefore, we take judicial notice of this testimony and we accept it as part of the record on appeal. Cf. Shuttlesworth v. Birmingham, 394 U.S. 147, 157 (1969); Jacques v. United States R.R. Retirement Bd., 736 F.2d 34, 40 (2d Cir. 1984); First Federal Sav. Bank v. Tazzia, 696 F. Supp. 904, 909 (S.D.N.Y. 1988); 9 Wright & Miller, Federal Practice and Procedure § 2410, at 359-61 (1971 & 1994 pocket part).

B. Absolute immunity

1. Standards for absolute immunity

"The presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties." Burns v. Reed, 500 U.S. 478, 486-87 (1991). State actors who seek absolute immunity "bear the burden of showing that public policy requires an exemption of that scope." Butz v. Economou, 438 U.S. 478, 506 (1978).

Judges enjoy absolute immunity from personal liability for "acts committed within their judicial jurisdiction." Pierson v. Ray, 386 U.S. 547 (1967). The tradition of judicial immunity dates back to English common law. Butz, 438 U.S. at 508. Without insulation from liability, judges would be subject to harassment and intimidation and would thus "lose 'that independence without which no judiciary can either be respectable or useful.'" Id. at 509 (quoting Bradley v. Fisher, 13 Wall. 335, 347 (1872)). The absolute immunity of a judge applies "'however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff.'" Cleavinger v. Saxner, 474 U. S. 193, 199-200 (1985) (quoting Bradley, 13 Wall. at 347).

"Judges have absolute immunity not because of their particular location within the Government but because of the

special nature of their responsibilities." Butz, 438 U.S. at 511. Thus, absolute immunity has been extended to individuals performing duties "closely associated with the judicial process." Cleavinger, 474 U.S. at 200. For example, a federal probation officer preparing presentence reports "acts as an arm of the court" and thus has absolute immunity to personal liability for damages. Dorman v. Higgins, 821 F.2d 133, 137-38 (2d Cir. 1987).

Whether non-judicial officers merit quasi-judicial absolute immunity depends upon "the functional comparability of their judgments to those of the judge." Imbler v. Pachtman, 424 U.S. 409, 423 n.20 (1976). The functional comparability analysis is made by considering the following six factors, among others, characteristic of the judicial process:

> (a) the need to assure that the individual can perform his functions without harassment or intimidation; (b) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; (c) insulation from political influence; (d) the importance of precedent; (e) the adversary nature of the process; and (f) the correctability of the error on appeal.

Cleavinger, 474 U.S. at 202 (citing Butz, 438 U.S. at 512).

Applying this analysis, the Supreme Court held in *Butz* that administrative law judges or hearing examiners within the executive branch who act pursuant to the Administrative Procedure Act (APA), are entitled to absolute immunity. As the Court noted, "[t]he conflicts which federal hearing examiners seek to resolve are every bit as fractious as those which come to court." Butz, 438 U.S. at 513. The Court went on to justify

absolute immunity on the ground that administrative adjudications contain many of the same procedural safeguards that characterize judicial proceedings. For example,

> [administrative] proceedings are adversary in nature. They are conducted before a trier of fact insulated from political influence. A party is entitled to present his case by oral or documentary evidence, and the transcript of testimony and exhibits together with the pleadings constitute the exclusive record for decision. The parties are entitled to know the findings and conclusions on all of the issues of fact, law, or discretion presented on the record.

Id. (citations omitted) . Furthermore, the Court stated that the position of administrative hearing examiners is structured to provide for a high degree of independence from the agency.

> When conducting a hearing . . . , a hearing examiner is not responsible to, or subject to the supervision or direction of, employees or agents engaged in the performance of investigative or prosecution functions for the agency. Nor may a hearing examiner consult any person or party, including other agency officials, concerning a fact at issue in the hearing, unless on notice and opportunity for all parties to participate. Hearing examiners must be assigned to cases in rotation so far as is practicable.

Butz, 438 U.S. at 514 (citations omitted).

In contrast, the Court has found prison officials, such as members of a prison disciplinary committee, "who hear cases

in which inmates are charged with rules infractions," not entitled to absolute immunity. Cleavinger, 474 U.S. at 194, 206. The Court found the committee members lacked independence:

> They are not professional hearing officers, as are administrative law judges. . . . They are employees of the Bureau of Prisons and they are the direct subordinates of the warden who reviews their decision. They work with the fellow employee who lodges the charge against the inmate upon whom they sit in judgment. The credibility determination they make often is one between a co-worker and an inmate. They thus are under obvious pressure to resolve a disciplinary dispute in favor of the institution and their fellow employee.

Id. at 203-04.

Furthermore, the *Cleavinger* Court found that a prison disciplinary proceeding contained few of the procedural safeguards relied upon in *Butz* "to insure the avoidance or correction of constitutional errors." For example,

> [t]he prisoner was to be afforded neither a lawyer nor an independent nonstaff representative. There was no right to compel the attendance of witnesses or to cross-examine. There was no right to discovery. There was no cognizable burden of proof. No verbatim transcript was afforded. Information presented often was hearsay or self-serving. The committee members were not truly independent.

Id. at 206. Because the Agriculture Department hearing examiners in *Butz* displayed many more of the characteristics

associated with the judiciary than did the prison disciplinary officers in *Cleavinger*, the Court found that even though the former were entitled to quasi-judicial absolute immunity the latter were entitled to qualified immunity only.

2. Application to the present case

Turning to the present case, we examine defendant's position in light of the six judicial characteristics the Supreme Court described in *Butz* and *Cleavinger*.

First, it is clear that defendant needs to perform his duties free from harassment and intimidation. Although defendant has been subject to numerous suits and discovery requests, he has testified that these actions do not influence his decision-making process in any way. Trial testimony of Donald Selsky, conducted on Nov. 2, 1993, in connection with Hameed v. Mann, 89-CV-578 (Selsky testimony in *Hameed*). These suits do not drain his personal financial resources because the state Attorney General provides him with legal representation. N. Y. Public Officers Law § 17 (2) (a) (McKinney) . Were defendant ever found liable in a § 1983 action, he would be entitled to indemnification by the state unless the damages "resulted from [defendant's] intentional wrongdoing." Id. at § 17(3)(a). As noted below, even in the absence of absolute immunity, defendant would be protected, in appropriate cases, by the doctrine of qualified immunity and by "firm application of the Federal Rules of Civil Procedure" including the procedural devices of summary judgment and a motion to dismiss. Butz, 438 U.S. at 307-08.

We recognize that the plaintiff in this case has abused the district court's resources in the past by engaging in a pattern of vexatious litigation. Such inmates, if unchecked, could seriously undermine defendant's ability to function as an indepen-

dent reviewer. Because of plaintiff's past pattern of bringing frivolous actions, however, Chief Judge Griesa of the Southern District has subjected him to strong sanctions, including limiting him to four unrepresented filings per year. In re Young, 93 Civ. 4320 (S.D.N.Y. June 24, 1993). Furthermore, in the appeal before us plaintiff is represented by counsel, who was appointed at this panel's suggestion. Nevertheless, we recognize that the possibility of harassment by litigation is a potentially serious problem in administering the prison disciplinary system.

Second, the disciplinary hearings at issue in this case suffer from the same procedural shortcomings as those in *Cleavinger*, except for the fact that the inmate has access to a verbatim transcript. Moye, 826 F. Supp. at 721. The lack of procedural safeguards at the hearing carries over to the administrative appeal before defendant, since that appeal relies on the same evidence adduced at the hearing and affords no additional procedural safeguards. Id. Furthermore, unlike the administrative hearing examiners in *Butz*, who were prohibited under the APA from performing "duties inconsistent with their duties as hearing officers . . . [such as] consult[ing] any person or party, *including other agency officials*, concerning a fact at issue in the hearing," 438 U.S. at 514 (emphasis supplied), defendant gives prison staff members advice on the conduct of hearings. He offers assistance in response to both general and "specific inquiries that arise during the course of a hearing." Moye, 826 F. Supp. at 722. See also Selsky testimony in *Hameed*; Deposition testimony of Donald Selsky, conducted on Oct. 15, 1993, in connection with Figueroa v. Selsky, 91 Civ. 3261 (JES) (Selsky deposition in *Figueroa*). Defendant's brief on appeal concedes that he gives such advice approximately three times per week. Thus, in certain cases, Selsky may be the only reviewer of rulings that are in essence his own. Id. at 723.

Third, defendant is not sufficiently independent to justify absolute immunity. "The simple fact that Selsky serves at the pleasure of superiors within DOCS creates a dependence upon the goodwill of these officials, who may, on occasion, place institutional interests above the rights of inmates." Moye, 826 F. Supp. at 723. For example, defendant has testified that he is supervised by Glenn Goord, the same person who supervises prison superintendents. Defendant stated that superintendents are likely to complain to Goord when defendant makes a determination that they consider adverse, and that Goord conveys this information to defendant in evaluating his work. Selsky deposition in *Figueroa*. Moreover, it is very likely that defendant will be called upon to rule on policies instituted by his superiors at DOCS. Thus, his function in the prison system exhibits the "relationship between the keeper and the kept" warned of in *Cleavinger*. Moye, 826 F. Supp. at 722 (citing Cleavinger, 474 U.S. at 204). We agree with Judge Ward in *Moye* that defendant is not "truly independent." Id. at 723. Defendant relies on a Sixth Circuit case, Shelly v. Johnson, 849 F.2d 228 (6th Cir. 1988) to show that he is sufficiently independent to justify absolute immunity. That case, however, which involved Michigan state prison hearing officers, is factually distinguishable. We note, moreover, that this circuit has already held that New York State correction officers who function as hearing officers are entitled to qualified immunity only. Walker v. Bates, 23 F.3d 652, 656 (2d Cir. 1994); Richardson v. Selsky, 5 F.3d 616, 621 (2d Cir. 1993).

Fourth, defendant relies on administrative and case law precedent in arriving at his decisions. Id. at 723. In this respect, his function resembles that of a judge.

Fifth, neither the disciplinary hearing nor the administrative appeal is truly adversarial in nature. Prisoners have no right to counsel in either proceeding. Furthermore, their rights to

cross-examine and challenge witnesses and evidence are limited. Id. The disciplinary hearings "rely heavily on hearsay, including unverifiable information from prison guards and informants." Id. at 721. As noted above, the procedural laxity of the disciplinary hearing is not cured on administrative appeal. Moye, 826 F. Supp. at 721.

By contrast, the hearings at issue in *Butz* were far more adversarial in nature. As the *Butz* Court pointed out, 438 U.S. at 513, the APA provides that parties in administrative hearings are entitled to be represented by counsel. 5 U.S.C. § 555(b). The agency may issue subpoenas upon a party's request. Id. at § 555(d). Parties are entitled to present their cases by oral or documentary evidence, which includes the right to conduct cross-examination. Id. at § 556(d).

Sixth, the type of injury plaintiff alleged may not be adequately correctable on appeal. We have recently held that purely prospective relief on administrative appeal does not adequately cure a due process violation in a disciplinary hearing if the prisoner has already served part of his disciplinary sentence in the SHU pending administrative review. Walker, 23 F.3d at 658 (2d Cir. 1994). Similarly, if the administrative appeal officer compounds the violation by unreasonably affirming, a later reversal in state court will be inadequate unless it includes monetary damages. Aside from the prison superintendent, who has discretionary authority to reduce a penalty, it appears that defendant Selsky provides the highest level of administrative review of disciplinary proceedings. 7 NYCRR § 254.8-9. Although defendant argues that a prisoner can obtain expeditious review of defendant's decisions under N.Y. Civil Practice Law and Rules Article 78, monetary damages are not available in such a proceeding. See Nelson v. Coughlin, 495 N.Y.S.2d 528 (App. Div. 1985); Gittens v. Anderson, 504 N.Y.S.2d 969 (Ct. Cl. 1986). While damages are technically available in a

narrow set of circumstances through an action in the Court of Claims, the scope of state immunity in these cases is uncertain. Arteaga v. State, 532 N.Y.S.2d 57 (N.Y. 1988); Minieri v. State, 613 N.Y.S.2d 510 (App. Div. 1994).

In sum, taking into account the presumption against absolute immunity, Burns, 500 U.S. at 486-87, and a defendant's corresponding burden in seeking to justify it, Butz, 438 U.S. at 506, we believe that the scale tips against defendant's claim of absolute immunity. We have no hesitancy in stating that this is far from an easy case and that the factors that influence us most are the lack of a sufficient guarantee of defendant's independence and insulation from communication with hearing officers about specific cases. Should this change in the future by restructuring defendant's position or by other means, the result might well be different. Cf. Cleavinger, 474 U.S. at 208 ("Congress could even consider putting in place administrative law judges to preside at prison committee hearings").

C. Qualified immunity

Even though defendant is not entitled to absolute immunity with respect to plaintiff's claims for damages, he may be entitled to at least qualified immunity, as plaintiff concedes. Richardson, 5 F.3d at 623-24 (held Selsky entitled to qualified immunity on facts before court; no discussion of absolute immunity). A government official has qualified immunity from liability for damages based on his official acts as long as those acts violate no clearly established statutory or constitutional right. Weg v. Macchiarola, 995 F.2d 15, 18 (2d Cir. 1993). The defendant must establish that he had an objectively reasonable belief that his act violated no clearly established rights. Id. Since the district court did not consider this issue, we remand so that it may do so.

Judgment reversed and case remanded for further proceedings consistent with this opinion.

VAN GRAAFEILAND, Circuit Judge, dissenting:

When Congress enacted the Klu Klux Klan Act, of which 42 U.S.C. § 1983 is a part, its principal goal was to eliminate the corrupting influence of the Klan and its sympathizers in the governments and law enforcement agencies of the Southern States. *See Allen v. McCurry*, 449 U.S. 90, 98 (1980). Section 1983 created no substantive rights; "it merely provide[d] remedies for deprivations of rights established elsewhere." *Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985); *Sykes v. James*, 13 F.3d 515, 519 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 2749 (1994). Congress could not have intended that pro se civil rights litigation become a "recreational activity" for long-term residents of our prisons. *See James v. Quinlan*, 886 F.2d 37, 40 n.5 (3d Cir. 1989)(quoting *Gabel v. Lynaugh*, 835 F.2d 124, 125 n.1 (5th Cir. 1988)). However, this is what has occurred. Thus, in *Gabel*, the court stated that about one appeal in every six during the preceding four months was a state prisoner's pro se civil rights case. 835 F.2d at 125 n.l. The following far from comprehensive tabulation of similar excessive filings in other cases is illustrative:

| Case | Actions |
|---|---|
| *Franklin v. Murphy*<br>745 F.2d 1221, 1231 n.13<br>(9th Cir. 1984) | over 100 |
| *In re Green*<br>669 F.2d 779, 781 (D.C. Cir. 1981) | 600-700 in 10 years |

| | |
|---|---|
| *Gelabert v. Lynaugh*<br>894 F.2d 746, 748 (5th Cir. 1990) | 15 appeals in 3 years |
| *Reneer v. Sewell*<br>975 F.2d 258, 261 (6th Cir. 1992) | 17 actions, 9 appeals |
| *Visser v. Supreme Court of California*<br>919 F.2d 113, 114 (9th Cir. 1990) | 11 in 16 months |
| *Demos v. Kincheloe*<br>563 F. Supp. 30, 31 (E.D. Wash. 1982) | 184 in 3 years |
| *Olson v. Coleman*<br>997 F.2d 726, 728 (10th Cir. 1993) | 37 appeals,<br>15 petitions for rehearing |
| *Abdul-Akbar v. Watson*<br>901 F.2d 329, 331 (3d Cir. 1990) | 43 in 7 years |
| *Johnson v. Cowley*<br>872 F.2d 342, 344 (10th Cir. 1989) | 54 actions,<br>33 appeals |
| *Procup v. Strickland*<br>792 F.2d 1069, 1070 (11th Cir. 1986) | over 176 |
| *In re Tyler*<br>839 F.2d 1290, 1291 (8th Cir. 1988) | 149 |

With the tremendous upsurge in section 1983 civil rights litigation came the realization that the concept of official immunity was not designed solely to protect against the personal liability of the official involved. The resources of United States Courts are limited both in time and in money. The

courts are obligated, therefore, to allocate their resources in a way that promotes the interests of justice. The Supreme Court has emphasized this judicial responsibility on several occasions. In *In re McDonald*, 489 U.S. 180 (1989), a per curiam court denied a pro se petitioner's request for permission to proceed *in forma pauperis* in applying for a writ a habeas corpus. Citing the petitioner's 73 unsuccessful prior filings with the Court, it said:

> Every paper filed with the Clerk of this Court, no matter how repetitious or frivolous, requires some portion of the institution's limited resources. A part of the Court's responsibility is to see that these resources are allocated in a way that promotes the interests of justice.

*Id.* at 184.

In *In re Sindram*, 498 U.S. 177, 179-80 (1991), the Court, citing *McDonald, supra*, said:

> As we explained, the Court waives filing fees and costs for indigent individuals in order to promote the interests of justice. The goal of fairly dispensing justice, however, is compromised when the Court is forced to devote its limited resources to the processing of repetitious and frivolous requests. *Pro se* petitioners have a greater capacity than most to disrupt the fair allocation of judicial resources because they are not subject to the financial considerations—filing fees and attorney's fees—that deter other litigants from filing frivolous petitions.

In *Briscoe v. LaHue*, 460 U.S. 325 (1983), which involved a section 1983 action against a police officer who allegedly gave perjured testimony, Justice Stevens, writing for six members of the Court, said:

> As the files in this case show, even the processing of a complaint that is dismissed before trial consumes a considerable amount of time and resources.
>
> This category of § 1983 litigation might well impose significant burdens on the judicial system and on law enforcement resources. As this Court noted when it recognized absolute immunity for prosecutors in *Imbler*, if the defendant official "could be made to answer in court each time [a disgruntled defendant] charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law." 424 U.S., at 425. To some degree the individual's burden might be alleviated by the government's provision of counsel, but a case that goes to trial always imposes significant emotional and other costs on every party litigant.

*Id.* at 343 (footnote omitted).

In Justice Rehnquist's dissenting opinion in *Cleavinger v. Saxner*, 474 U.S. 193, 210-11 (1985), he addressed squarely the issue of prisoners' propensity to sue:

> Not only may emotions run higher and tensions be exacerbated in the prison environment, but prisoners simply are not subject to many of the constraints which often deter members of the population at large from

> litigating at the drop of a hat. We have held, for example, that prisoners in confinement are entitled to free access to lawbooks or some other legal assistance. *Bounds v. Smith*, 430 U.S. 817 (1977). And the great majority of prisoners qualify for *in forma pauperis* status, which entitles them to relief from statutory filing fees. With less to profitably occupy their time than potential litigants on the outside, and with a justified feeling that they have much to gain and virtually nothing to lose, prisoners appear to be far more prolific litigants than other groups in the population. And prisoners have made increasing use of § 1983 and *Bivens*-type suits in recent years: 18,856 such suits were filed in federal court in the year ending June 30, 1984, as compared to just 6,606 in 1975.

*See also Gray v. Bell*, 712 F.2d 490, 496-97 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984), and *Robichaud v. Ronan*, 351 F.2d 533, 535-36 (9th Cir. 1965), where the courts listed among the reasons for awarding immunity, (1) the drain on the valuable official time of defending numerous suits, (2) the unfairness of exposing officials to vicarious liability for the acts of their subordinates, and (3) the duty of fairly representing the interests of the public in protecting and preserving the sound and orderly administration of justice. Some of these issues also were discussed by the Supreme Court in *Imbler v. Pachtman*, 424 U.S. 409, 422-29 (1976).

I believe that the above reasoning mandates the dismissal of the complaint in the instant case on the ground of absolute immunity. Selsky is a professional civilian hearing officer who performs a role analogous to that of an appellate judge in that he hears prisoners' appeals from 66 New York State prisons, with none of which he has any official connection. He hears

well over 5,000 appeals a year and, at the time the instant action was brought, he was a defendant in 156 pending actions. He establishes no direct contact with prisoners or guards by participating in prisoners' hearings as a subordinate of the warden.

Selsky's department does, however, conduct training sessions for hearing officers in the various prisons, in which the requirements of due process are taught and emphasized. Selsky also is available to answer procedural questions asked of him by hearing examiners as they arise. When questioned about this practice, he testified "I don't get into the specifics of the case or the inmate we are dealing with, but just maybe the issue." Obviously, Selsky's intent is to avoid due process violations whenever possible. This is his intent during the training sessions of hearing officers; this is his intent when responding to their inquiries; this continues to be his intent when reviewing appeals. His conduct does not constitute consulting "concerning a fact at issue in the hearing," a practice that is proscribed in *Butz v. Economou*, 438 U.S. 478, 514 (1978).

My colleagues conclude from the foregoing that Selsky may be reviewing rulings that are in essence his own. *Supra*, at 15. There is no evidence, however, that this occurred in the instant case. If I am asked to assume that it did, I will assume also that Selsky made the same good-faith interpretation of due process requirements in each instance. Every appellate tribunal prescribes rules for the conduct of its subordinate bodies. They are not thus precluded from passing upon the merits of what they have prescribed.

Like Justice Scalia in *Anderson v. Creighton*, 483 U.S. 635, 641-42 n.3 (1987), I find unpersuasive the often-made argument that Selsky may be less diligent in enforcing constitutional principles because the State indemnifies him for unintentional error. Federal judges do not stray from the full-faith perfor-

mance of their duties because they have lifetime appointments and absolute immunity. Selsky's employment would be short-lived if he was comfortable in error because of his entitlement to indemnification.

Young is a paradigmatic litigious prisoner, having brought over 100, mostly frivolous, pro se proceedings, at least 60 of which required action by this Court. It is difficult to control excesses such as this by indigent prisoners who have no money and already are incarcerated. Injunctions and penalties are of little help in preventing such improper conduct. The "strong sanctions" referred to by my colleagues, *supra*, at 14, simply will not work if no effective punishment can be imposed upon recalcitrant prisoners.

Qualified immunity, although better than no immunity at all, is not a satisfactory solution to the problem. Qualified immunity is an affirmative defense that must be pleaded and proved by the defendant. Each paper filed with the court and each argument heard in support of this defense utilizes some portion of the court's limited resources. In every one of the 156 actions now pending against Selsky, and in every one the numerous pro se actions that undoubtedly will follow my colleagues' holding, Selsky will have the burden of proving that it was objectively reasonable to conclude that the prisoner's constitutional rights were not violated. His decisions under review will have been based in large part upon factual issues that do not lend themselves to summary adjudication. *See Mahoney v. Hankin*, 844 F.2d 64, 68-69 (2d Cir. 1988). The immediate responsibility for the alleged violations will be that of the examiner who conducted the hearing and who concededly can claim only qualified immunity. Appellants such as Young, who seek only monetary relief, will have little to gain by suing Selsky, except whatever satisfaction they can derive from their acts of harassment. This is not the purpose for which section 1983 was enacted.

**APPENDIX B—Judgment and Order of the United States District Court for the Western District of New York and Report-Recommendation of the United States Magistrate Judge.**

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

---

JERRY YOUNG a/k/a RAMADAN

*against*

DONALD SELSKY

JUDGMENT IN A CIVIL CASE
CASE NUMBER: 92-CV-1050

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Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS SO ADJUDGED that the Report-Recommendation of Magistrate Judge Gustave J. DiBianco, filed June 18, 1993, is approved. The defendant Selesky's motion to dismiss is granted and the plaintiff's original complaint is dismissed; the plaintiff's second complaint against defendants Orengo, Althouse, Jewett, Schaller and Cunningham is dismissed with prejudice for failure to properly serve defendants, in accordance with the

Order of the Honorable Neal P. McCurn, Senior United States District Judge, filed July 28, 1993.

Date: July 30, 1993

GEORGE A. RAY
Clerk

CHRISTINE MERFENTHALER
Deputy Clerk

Filed
Jul. 30, 1993
U.S. District Court
N.D. of N.Y.
George A. Ray, Clerk
Utica

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

---

JERRY YOUNG a/k/a RAMADAN,

*Plaintiff,*

*against*

DONALD SELSKY,

*Defendant.*

92-CV-1050

---

Appearances: Jerry Young, a/k/a Ramadan, Plaintiff, Pro Se, 76-A-2018, Eastern Correctional Facility, P.O. Box 338, Napanoch, NY 12458-0338.

Hon. Robert Abrams, Attorney General of the State of New York, Attorney for Defendant, The Capitol, Albany, NY 12224. Of Counsel: Sue H.R. Adler, Asst. Attorney General.

Neal P. McCurn, S.J.

ORDER

The above matter comes to me following a Report-Recommendation by Magistrate Judge Gustave J. DiBianco,

duly filed on the 18th day of June, 1993. Following ten days from the service thereof, the Clerk has sent me the entire file, including any and all objections filed by the parties herein.

After careful review of all of the papers herein, including the Magistrate Judge's Report-Recommendation, and plaintiff's objections submitted thereto, it is

ORDERED, that:

(1) The Report-Recommendation is hereby approved.

(2) The defendant Selsky's motion to dismiss is granted and the plaintiff's original complaint herein is dismissed for the reasons set forth in the Magistrate Judge's Report.

(3) The plaintiff's second complaint herein against defendants Orengo, Althouse, Jewett, Schaller and Cunningham is dismissed with prejudice for failure to properly serve defendants.

DATED: July 7, 1993
Syracuse, New York

s/Neal P. McCurn
NEAL P. McCURN
SENIOR U.S. DISTRICT JUDGE

Filed
Jul. 28, 1993
U.S. District Court
N.D. of N.Y.
George A. Ray, Clerk
Syracuse

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

---

JERRY YOUNG a/k/a RAMADAN,

*Plaintiff,*

*against*

DONALD SELSKY,

*Defendant.*

92-CV-1050
(S.J. McCurn)

---

Appearances: Jerry Young, Plaintiff, Pro Se, 76-A-2018, Eastern Correctional Facility, P.O. Box 338, Napanoch, NY 12458-0338.

Hon. Robert Abrams, Attorney General of the State of New York, Attorney for Defendants, The Capitol, Albany, NY 12224. Of Counsel: Sue H.R. Adler, Asst. Attorney General.

Gustave J. DiBianco, Magistrate Judge

REPORT-RECOMMENDATION

This matter was referred to the undersigned for Report and Recommendation by the Honorable Neal P. McCurn, Senior United States District Judge, by Standing Order dated August 2, 1985.

In this case, plaintiff brings a civil rights action pursuant to 42 U.S.C. Section 1983, alleging due process violations relating to various disciplinary hearings.

Plaintiff seeks compensatory and punitive damages as well as injunctive relief.

Presently before the court is defendant Donald Selsky's motion to dismiss the complaint pursuant to Fed. R. Civ. P. Rule 12 (b)(1) and 12(b)(6) for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted. Plaintiff has responded in opposition to the motion.

## FACTS

FIRST COMPLAINT:

In March, April and May of 1992, plaintiff, Jerry Young, was an inmate at Eastern Correctional Facility. While he was incarcerated in this facility, plaintiff was accused of violating a series of Misbehavior Rules, 106.10, 100.11, 104.11 and 102.10.[1] In accordance with normal procedure, plaintiff would

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[1]Rule 106.10 states that "All orders of facility personnel will be obeyed promptly and without argument"; Rule 100.11 states that "Inmates shall not assault, inflict or attempt to inflict bodily harm upon any staff member"; Rule 104.11 states that "Inmates shall not engage in any violent conduct or conduct involving the threat of violence"; Rule 102.10 states that "Inmates shall not, under any circumstances make any threat, spoken, in writing or by gesture". N.Y. Comp. Codes R. and Regs. Tit. 7, § 270.2.

have been entitled to appear at the hearings, render his version of the facts, and propose questions that the hearing officers would present to plaintiff's witnesses who were to testify in his presence.[2]

Throughout the various disciplinary hearings, the plaintiff requested calling thirty-one inmates and two staff officers as witnesses on the plaintiff's behalf. Plaintiff claims that the hearing officers assigned to his cases repeatedly denied his requests.

Plaintiff appealed the hearing officers' decisions to defendant Selsky who affirmed the sentences upon appeal.

In July, 1992, plaintiff filed the first complaint in this action, naming only Donald Selsky as defendant. In that complaint, plaintiff sued Selsky for affirming the dispositions of the above hearings held in March, April and May, 1992.[3] Plaintiff's allegations against defendant Selsky are based solely on Selsky's review and affirmance of the hearing dispositions.

The court notes that defense counsel mentions a "second" complaint, authored by the plaintiff in this case against the defendant Selsky. Counsel includes a copy of this complaint as Exhibit D. Counsel states that this complaint attempts to challenge disciplinary actions taken against the plaintiff in

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[2]7 N.Y.C.R.R. § 254.5 "Inmate Witnesses" states in relevant part:

(a) The inmate may call witnesses on his behalf provided their testimony is material, is not redundant and doing so does not jeopardize institutional safety or correctional goals.

(b) Any witness shall be allowed to testify unless the hearing officer determines that doing so will jeopardize institutional safety or correctional goals.

[3]*See* Exhibit A contained in defendant's motion to dismiss complaint. Exhibit A is a copy of the original complaint.

1989. A review of the court's file as well as the docket sheet shows that no such complaint was ever filed with the court. Thus, there is no need to consider the issue of any amendment against Selsky.

SECOND COMPLAINT:

In September, 1992, plaintiff served another complaint upon the Attorney General's office involving an alleged deprivation of plaintiff's procedural due process rights in connection with disciplinary hearings. This complaint was filed with the court.

Plaintiff contends that defendants Orengo, Althouse, Cunningham, Schaller and Jewett were all responsible for denying plaintiff adequate and effective employee assistance by failing to require plaintiff's assistants to interview and collect written statements of witnesses in preparation for trial. The alleged due process violations occurred as a result of two Superintendent's Hearings held in March, 1992 while the plaintiff was incarcerated at Eastern Correctional Facility.

DISCUSSION

I. FIRST COMPLAINT:

Absolute Immunity

It has been clearly established that judges are immune from liability for damages for acts committed within their judicial jurisdiction. *Pierson v. Ray*, 386 U.S. 547, 553-54 (1967). Courts have extended absolute immunity "to certain others who perform functions closely associated with the judicial process." *Cleavinger v. Saxner*, 474 U.S. 193, 200 (1985). *See also Butz v. Economou*, 438 U.S. 478, 513 (1978). The immunity analysis

is a "functional" approach, which "flows from the nature of the responsibilities of the individual official". *Cleavinger*, 474 U.S. at 201.

The Supreme Court has specified various factors which are viewed as characteristic of the judicial process and are to be considered in determining whether absolute immunity is available as a defense. *Butz*, 438 U.S. at 512. *See also Cleavinger*, 474 U.S. at 202. The factors are: (a) The need to assure that the individual can perform his functions without harassment or intimidation; (b) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; (c) insulation from political influence; (d) the importance of precedent; (e) the adversary nature of the process; and (f) the correctibility of error on appeal. *Id.* at 512. In addition, courts view the independence of the judicial body as a key ingredient to a finding of absolute immunity. *Butz*, 438 U.S. at 514. *See also Cleavinger*, 474 U.S. at 203; *Shaddy v. Gunter*, 690 F. Supp. 860, 865 (D. Neb. 1988).

In *Dawes v. Selsky*, No. 91-CV-0479 (N.D.N.Y. August 13, 1992) (Report-Recommendation of Magistrate Judge Di Bianco), this court determined that Selsky fits under the *Butz* criteria as an independent adjudicator, and is therefore immune from suit. First, in the *Dawes* case, Selsky informed the court that he had administratively reviewed over 15,000 Tier III disciplinary determinations between 1988 and 1990.[4] Selsky also explained that hundreds of civil suits had been brought

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[4]See Report and Recommendation for *Dawes v. Selsky*, pg. 5 which refers to Exhibit B of Defendant's Motion for Partial Summary Judgment, Sections 8 through 10.

against him by dissatisfied inmates.[5] This type of function is akin to a traditional adjudicatory function, where one of the individuals main responsibilities is to review appeals from all facilities. This function would support the extension of absolute immunity to defendant Selsky so that he could perform his duties without harassment or intimidation.

Second, Selsky is insulated from political influence. In *Cleavinger*, the court did not grant disciplinary committee members absolute immunity, notwithstanding the procedural protections provided, because they were not professional hearing officers, they were employees of the prison and they worked with correctional officers who wrote the prisoners' misbehavior reports. *See Cleavinger*, 474 U.S. at 203-04.

However, the instant case is distinguishable from *Cleavinger*. Selsky is not on the correctional facility staff. In fact, he has very little contact with correctional officers. His position as the Director of Special Housing and Inmate Disciplinary Programs, requires him to act like a professional hearing officer, independently of the individuals at the facility. Defendant Selsky's office is in Albany and he does not work with the individuals who are writing the misbehavior reports. Thus, his position is more similar to that of an administrative judge as opposed to a prison employee. *See Shelly v. Johnson*, 849 F.2d 228, 230 (6th Cir. 1988).

Third, Selsky does apply relevant state and federal court precedents.[6] More importantly, he does act as an independent judicial officer. Therefore, he meets the fourth and fifth requirements set forth in *Butz* as well.

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[5]See Exhibit B, Defendant's Motion for Partial Summary Judgment, Section 13, discussed in *Dawes v. Selsky*.

[6]See *Dawes v. Selsky*, Report and Recommendation, pg. 6.

Both Magistrate Judge Ralph W. Smith, Jr. and United States District Judge Michael Telesca have determined that defendant Selsky should be afforded absolute immunity. In a very detailed unpublished opinion, Judge Kimba Wood of the Southern District of New York has also held that defendant Selsky is entitled to absolute immunity. *Parkinson v. Employee Assistant*, 91 Civ. 7401, 1993 U.S. Dist Lexis 4604 (S.D.N.Y. April 12, 1993). In addition to the above analysis, and very importantly, Judge Woods found that the procedural protections, including the right to appeal an adverse disciplinary finding, are sufficient to warrant extending the protection of absolute immunity to the appellate decisionmaker. *Id.* It is therefore, the recommendation of this court that Donald Selsky be afforded absolute immunity. The first complaint may be dismissed.

II. SECOND COMPLAINT

Rule 4(j) of the Federal Rules of Civil Procedure states that an action may be dismissed without prejudice if service of the summons and the complaint is not made upon a defendant within 120 days after the filing of the complaint and the plaintiff can show no good cause why such service was not effected within the specified time period. *See* Fed. R. Civ. P. 4(j).

A review of the file indicates that Jerry Young filed his second complaint against defendants Orengo, Jewett, Althouse, Schaller and Cunningham in September of 1992. Yet at no time since September, 1992 did the plaintiff send a copy of the summons and complaint to any of the five defendants listed in his amended complaint. In fact, Mr. Young stated in his

affidavit of service that he was serving these five defendants by serving the Attorney General's office instead.[7]

It is well established that pro se litigants are held to a less stringent standard than those governing lawyers and should not be penalized for their lack of legal expertise. *See Haines v. Kerner*, 404 U.S. 519, 520 (1972). However, Jerry Young is no ordinary pro se litigant. As Hon. Thomas P. McAvoy stated in *Young v. Juckett*, No. 87-CV-1599 (N.D.N.Y. August 29, 1992), "the plaintiff in this action is no stranger to pro se litigation. He has commenced scores of lawsuits and filed an equally large amount of applications for preliminary injunctive relief".[8] Given plaintiff's familiarity with initiating and prosecuting lawsuits, Mr. Young should be aware that he cannot merely serve the Attorney General's office with an amended complaint without providing any new defendants with notice.

The court has the discretion to dismiss this action if the plaintiff is unable to show "good cause" for his failure to abide by the requirements of Rule 4(j).[9]

In the instant case, the plaintiff has failed to show good cause for his failure to serve these proposed defendants within 120 days. In October of 1992, the plaintiff responded to the motion to dismiss by stating that he was entitled to amend his complaint and would be serving the defendants eventually. It was his belief, however, that sufficient notice was given to these new defendants by service on the Attorney General. To date, there has been no indication that the new complaint was served on the individual defendants.

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[7]See Exhibit B in Defendant's Notice of Motion To Dismiss Complaint.

[8]See Decision and Order of Hon. Thomas J. McAvoy in *Young v. Juckett*, Exhibit C in Defendant's Notice of Motion to Dismiss.

[9]*See* Fed. R. Civ. P. 4(j).

It is true that a plaintiff may amend once as a matter of right prior to an answer being filed by defendants. Fed. R. Civ. P. 15(a). If the plaintiff is not adding new defendants, he may serve the defendants' attorney, however, new defendants must be properly served. Plaintiff has not attempted to do so. Generally, the court would dismiss the action without prejudice, with leave to amend, but since there is no good cause for failure to serve these individuals, the court will recommend outright dismissal.

The court would also point out that this particular pro se plaintiff has *multitudes* of pending cases[10] and has been *enjoined* from further filings without permission of court. Many of plaintiff's claims have been frivolous and he has been abusive both in bringing litigation and in his conduct in court. He has been repeatedly warned about abusing requests for injunctions, and has been fined for his abusive and contumacious conduct by judges in this District. Plaintiff clearly knows what the consequences of his actions are and this court thus recommends dismissal with prejudice.

WHEREFORE, based on the findings in the above Report, it is

RECOMMENDED, that defendant Selsky's motion to dismiss be granted, and plaintiff's original complaint be dismissed, and is further

RECOMMENDED, that plaintiff's complaint against defendants Orengo, Althouse, Jewett, Schaller and Cunningham

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[10]Allowing an amendment in this case would allow plaintiff to continue his abusive litigation practices and would assist him in avoiding the injunction imposed by Chief Judge McAvoy which prohibits plaintiff from filing *new* lawsuits without prior permission of this court.

be dismissed with prejudice for failure to properly serve defendants.

Pursuant to 28 U.S.C. Section 636 (b)(1), the parties have ten days within which to file written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court. FAILURE TO OBJECT TO THIS REPORT WITHIN TEN DAYS WILL PRECLUDE APPELLATE REVIEW. *Small v. Secretary of Health and Human Services*, 892 F. 2d 15 (2d Cir. 1989); 28 U.S.C. Section 636 (b)(1); Fed. R. Civ. P. 72, 6(a), 6(e).

s/Gustave J. DiBianco
United States Magistrate Judge

Dated: June 18, 1993
Syracuse, New York

No. 94-1393

IN THE

# Supreme Court of the United States

**October Term, 1994**

DONALD SELSKY,

*Petitioner,*

*against*

JERRY YOUNG, a/k/a RAMADAN,

*Respondent.*

BRIEF IN OPPOSITION TO THE
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## RESPONDENT'S BRIEF IN OPPOSITION

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April 6, 1995

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## REASONS FOR DENYING THE WRIT

**Certiorari is not warranted because the question of whether the petitioner should be treated differently than any other prison official for purposes of absolute immunity is not one of national importance. There is no split in the Circuit Courts of Appeal on the narrow issue presented, and there is no other aspect of this case which would otherwise warrant the Court's discretionary review.**

Despite the petitioner's claim that this case presents an important question of federal law, it is readily apparent that it is not. This Court has already decided that the availability of a qualified immunity defense strikes the appropriate balance in weighing the public's interest in protecting prison officials who conduct disciplinary proceedings from the problems posed by vexatious litigation, while at the same time preserving prisoners' access to federal courts to seek recourse when these officials violate clearly established constitutional rights. *Cleavinger v. Saxner*, 474 U.S. 193, 206-207 (1985). The petitioner does not suggest that *Cleavinger* was wrongly decided, but only that it should not apply to someone in his position.

I

**The Court of Appeals Correctly Held That Under *Cleavinger*, Petitioner Was Not Entitled To Absolute immunity.**

New York State's prison disciplinary system suffers from the same type of procedural shortcomings which were identified in *Cleavinger*. *Young v. Selsky*, 41 F. 3d 47, 53 (2d Cir 1994). Prisoners are denied the right to counsel to represent them at the hearing, and may be denied the right to confront adverse witnesses and in some cases to even know the witnesses' names or the evidence that is being used against them. *Id.* at 53-54.[1] *Matter of Abdur-Raheem v. Mann* __ NY2d__ , 1995 WL 57482. (February 14, 1995). Although such procedures may be all that is required under the Constitution, *Wolff v. Mc Donnell*, 418 U.S. 539 (1974), they do not represent "a judicial

[1] In one respect New York prisoners are provided with even fewer procedural protections than those afforded to the inmates in *Cleavinger* -- they are not allowed to have counsel substitute represent them at the hearing. New York presently does not even provide counsel substitute to an illiterate or retarded inmate. *See, e.g., Horne v. Coughlin*, 795 F. Supp. 72 (N.D.N.Y. 1991).

process of the kind and depth that has occasioned absolute immunity". *Cleavinger*, supra, 474 U.S. at 206. The same factors which led the Court to distinguish its prior ruling in *Butz v. Economou* , 438 U.S. 478 (1978) -- the lack of adequate procedural protections and insulation from external pressures such as those provided under the federal Administrative Procedures Act (5 U.S.C. §551 et seq.) -- logically lead to the conclusion that Mr. Selsky is not entitled to absolute immunity.[2]

In New York, the procedural shortcomings at the hearing level are not ameliorated through the Department's internal appellate procedures.[3] *Young*, 41 F.3d at 53-54. Thus, the **only** *Butz* factor in which petitioner Selsky's position could even be arguably much different than that of a prison hearing officer, is the extent of his impartiality and independence from external influence. The Court of Appeals concluded that petitioner, being responsible both for training and advising hearing officers, and then deciding the inmates' appeals from adverse decisions, while remaining subordinate to officials in the Commissioner's office, was not so insulated from external pressures that he should be afforded a greater degree of immunity than that provided to the hearing officers themselves. *Young*, 41 F.3d at 53-54

Support for this conclusion was drawn from testimony in other cases which established, *inter alia*, that Selsky sometimes gives specific advice to hearing officers in the middle of a hearing, and then may subsequently rule on what in essence was his own advice.[4] The court also considered his testimony that prison Superintendents are

[2] The Department of Correctional Services is specifically exempted from New York's statute which establishes the general procedural rules for its administrative tribunals. State Administrative Procedures Act, Sections 102.1 and 301 et. seq. (McKinney). Because of this exemption, the quasi-judicial procedural protections available in virtually any other state administrative tribunal are not required in prison disciplinary hearings.

[3] In some aspects the procedures at the appellate level are more onerous for the prisoner as there is no right to any staff assistance in preparing an appeal, and New York prison officials will not allow an inmate law clerk who is assisting another prisoner with his appeal to listen to the tape of the hearing. Affidavit of Donald Selsky dated May 20, 1994 in *Matter of Graziano v. Mann*, Supreme Court Albany County, Index No. 1717 - 94.

[4] The court below described the development of the "expanded" and "unorthodox" record in this case. 41 F.3d at 49-51 . In his appeal, Mr. Young had argued that, at a minimum, he should have been allowed to conduct discovery with respect to whether Mr. Selsky was truly independent, especially given the fact that

likely to complain about his rulings in certain cases, and that these complaints may be discussed during Selsky's evaluation by his supervisor, an Assistant Commissioner who is also responsible for supervising Superintendents. *Id.* at 53.[5]

II

**The Question Presented Is Not A Significant One in Terms of Its Impact on Prison Litigation Generally**

Far from a presenting an issue of national importance, the narrow question presented in the petition - whether someone in petitioner's position should be afforded absolute immunity - is extremely limited in scope and in its ramifications for the prison disciplinary systems in other states. Other than those cases involving Mr. Selsky, there appears to have been only one post-*Cleavinger* case where the issue of absolute immunity for a central office appellate reviewer was raised. *Shaddy v. Gunter*, 690 F. Supp. 860, 864-65 (D. Neb. 1988) (appellate review panel entitled to absolute immunity). Given the petitioner's claims with respect to the number of prisoners' federal lawsuits involving procedural due process claims, Pet. Br. at 10, the fact that there are apparently no other reported cases on this issue belies the claim that this case is one of significant importance for anyone other than the petitioner.

Although the petitioner claims that the decision below "directly conflicts" with the reasoning in *Shelly v. Johnson*, 849 F.2d 228 (6th Cir. 1988), Pet. Br. pp. 9,12, *Shelly* involved the degree of immunity to be accorded "independent" hearing officers. It does

Magistrate Judge Di Bianco's Report-Recommendation had relied on an affidavit from another case. *See* Pet. Br. p. 32 (a) n 4.

[5] According to one of his former supervisors, Mr. Selsky would discuss "difficult" cases with him. Trial Testimony of Louis F. Mann in *Hameed v. Mann*, 89 CV 578 11/2/93, T. 91-92). Mann also testified that, while he was a Superintendent, Selsky would sometimes contact him for information which was not apparent on the record of a hearing. *Id.*, 40-41. *Compare, Butz v. Economou*, supra, 438 U.S. at 513-14, citing provisions of the Administrative Procedure Act, including 5 U.S.C. Sec. 554 (d)(1) (hearing examiner may not contact third parties, including agency officials, unless on notice and opportunity for all parties to participate).

In *Hameed*, Mr. Selsky testified that he depends on the Department's Office of Counsel -- hardly disinterested lawyers -- for legal advice about isues that come up in hearings. *Compare, ABA Code of Judicial Conduct*, Canon 3, Subd.(4) (judge may only seek legal advice from a disinterested expert upon notice to the parties and an opportunity to respond).

not speak directly to the question posed by someone like Mr. Selsky who reviews decisions made by hearing officers in a system which lacks the procedural protections and independence required for a grant of absolute immunity.[6] *Cf. Moye v. Selsky*, 826 F. Supp. 712, 721-22 (S.D.N.Y. 1993) (the inherent inequity in giving absolute immunity to the appellate review officer while denying it to the hearing officers runs counter to the teachings of this Court which emphasize that State actors are to be treated similarly in terms of immunity) (citations omitted).[7]

An additional complicating factor in this case is the manner in which the Department has structured Mr. Selsky's dual role as its chief disciplinary trainer/advisor as well as the appellate review officer. The majority opinion in the Court of Appeals explicitly recognized that this is a different scenario than that which would be presented by someone whose sole responsibility was to review inmates' disciplinary appeals.

> We have no hesitancy in stating that this is far from an easy case and the factors that influence us most are the lack of a guarantee of defendant's independence and insulation from communication with hearing officers about specific cases. *Should this change in the future by restructuring defendant's position or by other means, the result might well be different.* (citing *Cleavinger*, 474 U.S. at 208) (emphasis supplied).

41 F.3d at 54.

Following this Court's approach in *Cleavinger*, the Second Circuit has left the door open for the Department to redefine the petitioner's position to eliminate what the court believed were the most influential factors weighing against a grant of absolute immunity. Since there is no suggestion by the petitioner that this would be impracticable, a wiser course of action at this time is to allow the petitioner and his

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[6] We believe that *Shelly* was wrongly decided, in part because the Court of Appeals failed to give appropriate weight to the lack of procedural protections when considering whether the disciplinary proceedings were sufficiently "quasi-judicial" in nature so as to warrant absolute immunity for the individuals who preside over them. *Compare, Tulloch v. Coughlin*, ___ F. 3d ___ , 1995 WL 87406 (2d Cir February 28, 1995) (so-called "independent" hearing officers are not entitled to absolute immunity where five of the six factors cited in *Butz v. Economou, supra*, militate against such an award). In any event, the court below was correct in distinguishing *Shelly* on the facts of that case.

[7] Since Mr. Selsky is responsible for training and advising hearing officers, granting him absolute immunity could lead to a situation where he is completely immunized and yet those who may have relied on his advice or training (or lack thereof) are forced to defend their actions in court.

employers, if they find the burdens of litigation to be so overwhelming, to bring New York State's prison disciplinary system, and particularly the appellate review process, into more of a quasi-judicial mode. Given this invitation by the Second Circuit Court of Appeals for the Department to solve at least a part of the problem administratively, and the fact that this question has not even been addressed yet by any other Circuit, discretionary review in this Court is not warranted, particularly in the absence of any true hardship on the petitioner.[8] Also, as noted in *Young*, Mr. Selsky has testified that the extent of the litigation he has been involved in does not influence his decision-making process in any way. *Id.* at 53.

Mr. Selsky's dual role of trainer/advisor and appellate review officer militates against granting the writ in another way as well. The central thrust of the petitioner's arguments and those contained in Judge Van Graafeiland's dissent, is that there are so many vexatious and harassing lawsuits filed by prisoners that Mr. Selsky needs absolute immunity to protect him from being subject to suit even when he has, as in this case, the ability to raise qualified immunity as a defense. The argument, however, is based on an emotional appeal to "do something" about the number of prisoner lawsuits rather than a careful analysis of the claim raised and the impact it would actually have on prison litigation.

As the petitioner points out, a prisoner who files a lawsuit over the procedures or results of his disciplinary hearing can sue the hearing officer. He relies on this state of affairs to support his argument. Pet. Br. at 14-15.[9] What he ignores is that granting Selsky, as the appellate review officer, absolute immunity will necessarily have a *de minimis* effect on the number of prisoner lawsuits as long as the hearing officers themselves are subject to suit. Since the hearing officers and Mr. Selsky are both

[8] Despite the large number of lawsuits he has apparently been involved in, Mr. Selsky has not complained about any monetary judgments having ever been taken against him. He would, in any event, be entitled to indemnification under the N.Y. State's Public Officers Law, Sec. 17 (3) (a), and he is represented by the Attorney General's office. *Young*, 41 F.3d at52.

[9] The hearing officers involved in the hearings at issue in this case, who were named as defendants in a second, related suit, were dismissed based on the respondent's failure to serve them. *Young*, 41 F. 3d at 49.

represented by the Attorney General's office, it usually takes only a few words -- not even a separate paper -- to raise the same defenses for Mr. Selsky as those already being made on behalf of the hearing officer, including, where applicable, a claim of qualified immunity in a motion for summary judgment.

Even Mr. Selsky himself is likely to gain little from a favorable decision in this case. Apparently the principal litigation burden which affects petitioner personally is having to be deposed, as he does not complain about the number of trials he has been called to testify at.[10] However, even if granted absolute immunity for his appellate review role, there could be reasons arguing in favor of subjecting Mr. Selsky to being deposed as a non-party witness in disciplinary cases where questions arose concerning hearing procedures. For instance, when a prisoner has raised several issues on appeal and Mr. Selsky has reversed or modified the decision, apparently concluding that the hearing officer violated the prisoners' rights in some unidentified manner, it may be important for the prisoner to know upon what basis he made his decision. Since the practice in Mr. Selsky's office is to tell prisoners only whether their hearing has been affirmed, reversed or modified, without any explanation, some discovery of the reasons for which the decision was made may be in order.[11]

Moreover, because of his role as the person responsible for hearing officer training and supervision, Mr. Selsky himself may likely be a defendant even if he was granted absolute immunity for his function as an appellate review officer. *See e.g.*, *Gilbert v. Selsky*, 867 F. Supp. 159, 166 (S.D.N.Y. 1994) (Selsky is held liable both for his role in affirming defective hearing and for failing to adequately train and supervise hearing officers). Presumably he also could be held liable for advice and direction given to a hearing officer, if such advice was a proximate cause of a constitutional

[10] Mr. Selsky may be called to testify by other prison officials, as was the case in *Hameed v. Mann*, *supra*, where he was called by the defendant hearing officer and Superintendent to vouch for the procedures employed in that case.

[11] In *Tulloch v. Coughlin*, supra, __ F.3d at __, 1995 WL 87406 at * 3, the court found that the value of one of the *Butz* factors, the importance of precedent, was diminished because the Department does not have a compendium of hearing results and appeals for hearing officers to rely on, as a result of which similar factual situations could lead to different results.

violation.

While the petitioner has ably used the large number of prisoner lawsuits to draw the Court's attention to his cause, this case cannot deliver any meaningful relief to crowded judicial dockets. Even a resolution *in favor* of the petitioner would have no impact on the number of prisoner lawsuits, or the amount of work involved in defending them. To the extent that the problems of vexatious prison litigation are amenable to being addressed through decisions of this Court, this case does readily lend itself to being applied in any broad manner.[12] Unless the Court wishes to revisit the issues already decided in *Cleavinger*, granting certiorari in this case would be a diversion of judicial resources.

## CONCLUSION

## THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

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[12] There has been no suggestion that the instant case, challenging the denial of witnesses requested in several disciplinary hearings, is frivolous.